STATE OF MICHIGAN

COURT OF APPEALS

GRACE VAUGHAN, KAREN MURPHY, DONNA J. WESTON, EDWARD R. WESTON, PATRICIA S. WILSON, and ROSEMARY COOK,

Plaintiffs-Appellants,

and

BARNEY MCCOURT, MARGARET MCCOURT-BEDES, PATRICIA E. O'MALLEY, and ROBERT H. REEVE,

Plaintiffs/Counter Defendants/Cross-Defendants-Appellants,

v

RITA THOMAS and RITA THOMAS REVOCABLE TRUST,

Defendants/Counter Plaintiffs/Cross-Plaintiffs-Appellees,

and

DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, DEPARTMENT OF NATURAL RESOURCES, IOSCO COUNTY ROAD COMMISSION, and TOWNSHIP OF OSCODA,

Defendants/Counter Defendants/Cross-Defendants-Appellees,

and

UNPUBLISHED
August 23, 2007

No. 267396
Iosco Circuit Court
LC No. 00-002849-CH

TOWNSHIP OF AUSABLE,

Counter Defendant/Cross-Defendant/Third-Party Defendant-Appellee,

and

IOSCO COUNTY DRAIN COMMISSION, STATE TRANSPORTATION DIRECTOR, JERRY N. THOMAS, KATHLEEN THOMAS, JOAN M. RYAN, DEANNA RUCKMAN, BOBBIE N. RUCKMAN ET UX, LAUREL J. ISHAM, JOHN LANE, JENNY E. LANE, WILLIAM S. LOTT, JILL A. LOTT, GEORGE EGERVARI, KELLIE SWYNTAK, GALLANT SWYNTAK, KIMBERLY SWYNTAK, ROSEMARY RYAN WELCH, KAREN MURPHY, DAVID M. WYGANT, MOLLY T. WYGANT, VIRGINIA J. MALLROY, JOHN SMITH ET UX, PETER B. MAPES, NONA I. MAPES, and DOROTHY M. THOMAS ET AL,

Counter Defendants/Cross-Defendants-Third Party-Defendants.

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order vacating a portion of Park Street in Oscoda Township, granting title to that portion of the street to defendant the Rita Thomas Revocable Trust, and extinguishing the private rights of other subdivision property owners to the disputed portion of the street. We affirm in part and reverse in part.

The underlying facts are set forth in this Court's prior opinion. *Vaughan v Thomas* (*On Reconsideration*), unpublished opinion of the Court of Appeals, issued July 8, 2004 (Docket No. 243265). Additional pertinent facts arising out of testimony given on remand are discussed below in our analysis. In the prior opinion, and relevant to the issues presented here, the panel addressed plaintiffs' assertion of private rights of access to Lake Huron via Park Street as owners of land within the subdivision and the trial court's failure to adjudicate those rights. The Court held that "[t]he trial court erred by failing to consider plaintiffs' rights as owners under the plat." *Vaughan*, *supra*, slip op at 10. Additionally, this Court permitted defendants to reassert a claim under MCL 560.221 of the Land Division Act (LDA), MCL 560.101 *et seq.*, with respect to vacating that part of the plat encompassing the disputed section of the roadway.

On remand, defendants Thomas pursued vacation under the LDA, and the trial court ruled in favor of vacating the disputed section of roadway, acknowledging that the relevant governmental entities had now officially vacated the area and terminating plaintiffs' private interests in the area, given that they had failed to present a reasonable objection to the vacation of the disputed portion of Park Street. Plaintiffs appeal the trial court's ruling.

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Similarly, when reviewing a trial court's ruling on matters of equity, this Court reviews the trial court's conclusions de novo, but the trial court's underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Finally, interpretation of the LDA constitutes a legal issue that we review de novo on appeal. *DLF Trucking, Inc v Bach*, 268 Mich App 306, 309; 707 NW2d 606 (2005).

In *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207; 731 NW2d 472 (2007), this Court observed that the purchaser of property recorded in a plat receives both the interest described in the deed and the rights reflected in the plat and that a grantee of property located in a platted subdivision acquires a private right entitling him to the use of the streets and ways laid down on the plat.

However, this private right, arising from a subdivision plat, is subject to divesture under the LDA. Pursuant to MCL 560.221, "[t]he circuit court may . . .vacate, correct, or revise all or a part of a recorded plat." As owner of a lot in the platted subdivision, defendant Thomas had standing to initiate a suit to vacate the disputed section of roadway. MCL 560.222. MCL 560.226(1) provides that "[u]pon trial and hearing of the action, the court may order a recorded plat or any part of it to be vacated, corrected, or revised, with [certain] exceptions." But none of these exceptions preclude vacation here, considering that all of the necessary governmental entities have by resolution vacated the area or approved of the vacation. *Id*.

With respect to the private rights of owners of lots contained within a plat, our Supreme Court in *In re Engelhardt*, 368 Mich 399, 402-403; 118 NW2d 242 (1962), stated the following:

> The point is that at least as between the plat proprietors and their grantees and as between the grantees within the plat, or their successors, private rights to the use of . . . property [publicly dedicated[1]] arise and are in addition to the rights

[1] *Engelhardt* dealt with the rights of owners of platted lots and a petition to vacate a park located within the plat that had been dedicated for public purposes.

> of the public acquired upon acceptance of the dedication. These rights are subject to statutory vacation proceedings such as are invoked here. [Citing *Westveer v Ainsworth*, 279 Mich 580; 273 NW 275 (1937).]

In *Vander Meer v Ottawa Co*, 12 Mich App 494, 496-497; 163 NW2d 227 (1968), this Court, although finding no error in the trial court's denial of a petition to vacate, acknowledged that private rights held by subdivision lot owners arising from a recorded plat could be terminated by vacation proceedings if no reasonable objections were presented.

In *Martin v Beldean*, 469 Mich 541; 677 NW2d 312 (2004), the Supreme Court addressed a private dedication in a plat that reserved the use of an outlot for subdivision lot owners. The plaintiffs in *Martin* had sought to build a home on part of the outlot and sued to have the dedicatory plat language declared null and void. The plaintiffs proceeded by way of a quiet-title action instead of under MCL 560.221 of the LDA. *Id.* at 544-550. The Court indicated that Michigan law allowed and recognized the private dedication, and it held "that the exclusive means available when seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229 [LDA]." *Id.* at 542-543. The Court agreed with the defendants that if the plaintiffs wanted the plat conveyance regarding the outlot deemed null and void, an action under MCL 560.221 *et seq.*, was necessary. *Id.* at 550. The Court permitted the plaintiffs, if they desired, to file an action under the LDA on remand. *Id.* at 552.[2]

In *Tomecek v Bavas*, __ Mich App __; __ NW2d __, issued July 3, 2007 (Docket No. 258907), slip op at 5, this Court stated that the "provisions found in MCL 560.221-229 for vacating, correcting, or revising a plat are designed not only to alter the plat map filed with the municipality, but to alter the underlying property interests reflected in the map."

Accordingly, given that subdivision lot owners can be deprived of property expressly dedicated for their use by vacation of a plat under the LDA, there can be no dispute here that the private rights held by plaintiffs to use the disputed section of roadway could be terminated under the LDA. To the extent that language in *Nelson v Roscommon Co Road Comm*, 117 Mich App 125, 132-133; 323 NW2d 621 (1982), might suggest the contrary, it is inconsistent with Michigan law. Although the prior panel in the case at bar cited *Nelson*, it was cited in support of the simple proposition that the trial court erred in failing to consider plaintiffs' private rights. If plaintiffs' private rights or interests to use the disputed section of roadway would not be terminated or impaired by vacation of the area under the LDA, the prior panel would not have bothered allowing defendants Thomas to pursue statutory vacation on remand.

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[2] In *Little v Hirschman*, 469 Mich 553, 564; 677 NW2d 319 (2004), a case decided the same day as *Martin*, *supra*, the Court held that a private dedication conveyed "at least an irrevocable easement in the dedicated land." But *Martin* makes clear that statutory vacation through court proceedings relative to plats can effectively terminate any rights.

We next turn to the burden of proof associated with an action to vacate all or part of a plat. When the plat at issue was recorded in 1868, the statute concerning the vacation of plats permitted changes thereto provided there was "no reasonable objection" to the making of such an alteration or vacation. I Comp Laws 1857, § 1137, p 381. The plat map of the Village of Oscoda was recorded subject to this statutory condition. *Westveer, supra* at 584. The same "reasonable objection" test still applies to current petitions to vacate even though the Legislature removed the "reasonable objection" language with the enactment of the Subdivision Control Act of 1967, MCL 560.101 *et seq.*, which was renamed the LDA by 1996 PA 591. *Tomecek, supra*, slip op at 10-11; *In re Gondek*, 69 Mich App 73, 74-75; 244 NW2d 361 (1976).

"There is no common test as to the things the lot purchaser must do upon the platted public grounds in order to make his objection to vacation reasonable. The question may be one of reasonable use." *Westveer, supra* at 584. Moreover, "[t]he whole situation must be taken into account." *Id*.

Plaintiffs argued that the disputed portion of Park Street should not be vacated because it provided them with pedestrian access to and a view of Lake Huron, and historically had also been used for vehicular traffic to the water's edge. The trial court rejected plaintiffs' arguments, determining that their objections to vacating the road were not reasonable. The trial court cited testimony that approximately 50 years ago a sand dune blocking any view of the lake from the road had developed near the water in the disputed portion of Park Street. The court also noted that plaintiffs and other subdivision property owners could access the waterfront from the large township park bordering Park Street and other road ends in the subdivision. In reaching its decision, the trial court also noted that the evidence suggested that very few people had attempted to use Park Street to access the waterfront in recent years.

Plaintiffs assert that the record does not support the trial court's conclusion that other adequate means of access to the waterfront existed. In this regard, plaintiffs cite testimony from sisters-in-law Joan Ryan and Rosemary Ryan-Welch, who both stated that using the park to access the water was not a good alternative for them because a boardwalk that runs along the water's edge in the park is difficult for them to step up onto. However, there was also testimony that the boardwalk was installed in part to provide better access to the park for those with disabilities, and that there was handicap accessibility at River Road, which is only two blocks north of Park Street. There was also testimony that several other road ends provided direct access to the parking area for the waterfront park.

The record also supports the trial court's conclusion that the view from the road had long ago been obstructed by the development of a sand dune. While there was some contrary testimony presented suggesting that either the height of the dune fluctuated over the years or that it only became high enough to block the lake view after the Thomas house was constructed, this Court generally defers to the trial court's credibility determinations. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). Moreover, while the construction of the Thomas family's home at the road end may have contributed to the loss of view for some subdivision property owners, the extent of the impairment appears to be less significant than that previously found to show an adequate objection. See, e.g., *Westveer, supra* at 585; *Yonker v Oceana Co Rd Comm*, 17 Mich App 436, 443-444; 169 NW2d 669 (1969). This is not a case

where the evidence suggests that vacation of the disputed road would undermine the plattor's original intent or obscure a particularly unique view. We find no error in the court's conclusion.

Plaintiffs also attempted to argue in the trial court that the construction of the home in the disputed area before the road was officially abandoned or vacated constituted a nuisance. The trial court rejected this line of argument on the basis that plaintiffs had not pleaded a claim of nuisance. In reasserting their nuisance allegations on appeal, plaintiffs fail to address the basis of the trial court's ruling. When an appellant fails to dispute the basis of a ruling by the trial court, this Court need not even consider granting plaintiffs the requested relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Moreover, plaintiffs fail to connect this argument to the issue of vacation under the LDA. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant next argues that the trial court erred by excluding a tax document offered to establish that the lake view plaintiffs allegedly lost had real value. Extensive analysis of this issue is unnecessary. Because defendants did not object to the testimony concerning the import of the document, the essential evidence on which plaintiffs sought to rely was admitted. Moreover, the trial court ultimately rejected plaintiffs' loss of view argument as a reasonable objection to vacating the street not because the view was without value, see *Yonker*, *supra* at 443-444, but because the court concluded the view was previously obstructed by the growth of the aforementioned sand dune. And we find no error in this assessment. Accordingly, because there is no reason to believe that the outcome of the case would have been different had the document been admitted or that its exclusion otherwise affected plaintiffs' substantial rights, reversal is not required. MRE 103(a); MCR 2.613(A).

Finally, plaintiffs assert that the trial court erred by refusing to enforce this Court's taxation of costs incurred as a result of the earlier appeal in this matter. With regard to costs on appeal, our court rules provide that "[e]xcept as the Court of Appeals otherwise directs, the prevailing party in a civil case is entitled to costs." MCR 7.219(A). "The taxation of costs is neither a reward granted to the prevailing party nor a punishment imposed on the losing party, but rather a component of the burden of litigation presumed to be known by the affected party." *North Pointe Ins Co v Steward* (*On Remand*), 265 Mich App 603, 611; 697 NW2d 173 (2005).

The Chief Clerk of this Court taxed costs against defendants in accord with MCR 7.219. Defendants failed to seek review of the clerk's decision in accord with MCR 7.219(E). Nevertheless, defendants asked the trial court on remand not to enforce this Court's award of costs, seemingly on the basis that defendants might eventually also be entitled to costs. The court's final judgment provided "that all parties are responsible for their own costs and attorney fees and that any previous orders for costs and attorney fees, including the Taxation of Costs by the Court of Appeals, shall not be taxed or enforced by this Court."

MCR 7.215(F) provides that "execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned . . . with a certified copy of the court's judgment." Accordingly, it appears that

plaintiffs properly sought to enforce this Court's taxation of costs in the trial court after this matter was remanded. On remand, a lower court should perform those actions required by law and justice, as long as doing so is consistent with the judgment of the appellate court. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). By refusing to enforce this Court's administrative taxation of costs, which was based on the judgment rendered, the trial court was acting inconsistently with the judgment of this Court. Defendants assert that the trial court was not rejecting an order issued by a superior court, but was merely making a set-off. However, this argument is clearly belied by the transcripts that indicate the court found that both sides had prevailed in the trial court, and, thus, that no one was entitled to costs incurred therein. The trial court erred by refusing to enforce this Court's taxation of costs.

We affirm the trial court's decision vacating the disputed portion of Park Street but reverse that portion of the court's order refusing to enforce this Court's taxation of appellate costs. We remand this case for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Deborah A. Servitto